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No.

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Petitioners,

v.

THOMAS D. LARSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 20, 1982

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QUESTIONS PRESENTED

1. Whether the plurality's "balancing" test in *Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662 (1981), or the dissent's "deference" standard should apply in a Commerce Clause challenge to the constitutionality of a state "highway safety" statute requiring the display of state inspection certificates by interstate trucks already subject to equally stringent federal inspection requirements (not reflected by the issuance of certificates) where (a) there was no legislative discussion at the time of enactment to demonstrate whether the state legislators really intended the statute as a measure to improve highway safety or were motivated by other factors, (b) there was no in-state constituency affected by the statute, and (c) the trial court found that the statute would actually worsen the risk of highway accidents involving trucks, a finding the court of appeals did not disturb.

2. Whether, under the guise of applying the dissent's deference test, the court of appeals in reality enunciated yet a third standard, one that creates an irrebuttable presumption in support of state legislation encroaching upon interstate commerce so long as the state devises any sort of *ex post facto* safety justification for the statute, regardless of how spurious the district court finds that justification to be.

PARTIES TO THE PROCEEDING AND DISCLOSURE OF CORPORATE AFFILIATIONS

Petitioners, American Trucking Associations, Inc., Pennsylvania Motor Truck Association, Maryland Motor Truck Association, Coastal Tank Lines, Inc., CRST, Inc., Smith Transfer Corp., Ryder Truck Lines, Inc. and Preston Trucking Corp. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 20, 1982.* Respondents are Thomas D. Larson, Secretary of the Department of Transportation of the Commonwealth of Pennsylvania, Harvey Bartle, III, then Attorney General for the Commonwealth of Pennsylvania, and Daniel F. Dunn, Commissioner of the Pennsylvania State Police.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, petitioners disclose the following information regarding corporate affiliations:

American Trucking Associations, Inc. ("ATA") is the national trade association of the motor carrier industry, comprised of fifty-one (51) federated associations located in the fifty states and the District of Columbia. It is a non-profit corporation, organized and operating under the laws of the District of Columbia. In addition, thirteen individual conferences representing specialized segments of the trucking industry are affiliated with ATA. ATA has one wholly-owned subsidiary, ATA Services, Inc., also non-stock.

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* A more complete description of the petitioners appears in the accompanying Appendix for Petitioners American Trucking Associations, Inc., et al., and Steamship Operators Intermodal Committee, at page A46. Petitioner Steamship Operators Intermodal Committee will submit a separate petition.

The Pennsylvania Motor Truck Association, Inc. is the state-wide American Trucking Associations, Inc. affiliate trade association of the motor carrier industry in Pennsylvania. It is comprised of individual members representing all types of motor carriers, both private and for hire, and allied trades. It is a non-profit, non-stock corporation, organized and operated under the laws of the Commonwealth of Pennsylvania. The Pennsylvania Motor Truck Association, Inc. has no subsidiaries.

The Maryland Motor Truck Association is the state-wide American Trucking Associations, Inc. affiliate trade association of the motor carrier industry in Maryland. It is comprised of individual members representing all types of motor carriers, both private and for hire, and allied trades. It is a non-profit, non-stock corporation organized and operated under the laws of the State of Maryland. The Maryland Motor Truck Association has no subsidiaries.

Coastal Tank Lines, Inc. is a subsidiary of Coastal Industries, Inc. Other publicly-held subsidiaries of Coastal Industries, Inc. are BTS Leasing Inc., Leaseway Inc., Environmental Pollution Control Services, Inc., CTL Leasing Inc., Coastal Tank Lines, Inc. of Virginia, Ny-Trex Inc. and AIM Consultants Inc.

Smith's Transfer Corp. is a subsidiary of ARA Services, Inc.

Ryder Truck Lines, Inc. is a subsidiary of IU International, Inc.

Preston Trucking Corp. is a publicly-held corporation whose subsidiaries are all owned by Preston.

CRST, Inc. is a private company owned by a family-held corporation.

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CITATION OF OPINION BELOW

The Opinion of the Court of Appeals for the Third Circuit, not yet reported, appears in the Appendix for Petitioners submitted hereto commencing at page A1. The United States District Court for the Middle District of Pennsylvania Opinion and Order are reported at 515 F. Supp. 1327 (M. D. Pa. 1981).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 20, 1982. Appendix for Petitioners at pages A76-A77. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Article I, Section 8, Clause 3:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States.

75 Pa. Cons. Stat. § 4703(a)(2) (Purdon Cum. Supp. 1982-1983):

> § 4703. Operation of vehicle without official certificate of inspection
>
> (a) General rule. ——
>
> • • • •
>
> (2) No motor carrier vehicle shall be operated on a highway unless it displays a currently valid certificate of inspection issued under this chapter or by another state.

STATEMENT

This case demonstrates the substantial need to answer the questions left open by the Court's divided opinion in *Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662 (1981), and offers an unrestricted opportunity for the Court to do so. It involves a Pennsylvania "highway safety" statute enacted with absolutely no legislative discussion to reveal the motivations of the legislators who voted for it. Thus, the case is devoid of the factors that prompted Justice Brennan's concurring opinion in *Kassel*, and squarely frames the question whether the plurality's "balancing" test or the dissent's "deference" standard should apply in Commerce Clause challenges to state highway safety statutes.

Review by the Court is important for a second reason as well. The court of appeals as the first appellate court to grapple with implementing Justice Rehnquist's approach in *Kassel* purported to apply the deference test. Actually, however, the court enunciated yet a third standard, one that renders the federal courts powerless to invalidate any state legislation passed and defended in the name of highway safety. So long as the state's attorneys are able at trial to come up with any *ex post facto* justification for the statute, the court of appeals has held, the trial court is obligated to accept that explanation as demonstrating the non-illusory contribution of the act to highway safety regardless of how spurious, unconvincing or unacceptable the trial court finds the state's explanation to be.

Under the test promulgated by the court of appeals, state highway safety legislation challenged under the Commerce Clause may be invalidated only if the state offers no defense, as in *Raymond Motor Transportation, Inc. v. Rice*, 434 U. S. 429 (1978). If the state comes forward with any evidence, however incredible, that is

the end of the court's inquiry. This standard, in effect, repeals the Commerce Clause in the highway safety context, and review by this Court is essential.

The Pennsylvania statute in question, Section 4703 (a)(2) of the Vehicle Code, 75 Pa. Cons. Stat. § 4703 (a)(2) [hereinafter "Section 4703(a)(2)" or "the Act"], would require all motor carrier vehicles (defined as trucks, truck tractors and tractor-trailer combinations over 17,000 lbs. gross weight) operating upon the highways of Pennsylvania to bear a currently valid state certificate of inspection.

While this requirement may at first blush appear innocuous, and probably seemed so to the legislators who inserted Section 4703(a)(2) into pending legislation at the last moment and enacted it with no discussion or debate,[1] the laws of thirty-one states [hereinafter referred

1. The legislation in which Section 4703(a)(2) was eventually inserted began as an amendment to the Pennsylvania Vehicle Code regulating the use of studded snow tires. After undergoing refinements as a studded snow tire bill, the legislation emerged from the Committee of Transportation of the House of Representatives with additional provisions increasing the annual fees for trucks and truck tractors and increasing maximum vehicle axle weights tacked on.

On third consideration before the House of Representatives, the statute was changed again—including a proposed amendment reducing from twice to once per year the number of inspections to which Pennsylvania registered vehicles would be subjected. Only after being referred to and emerging from a six-person joint Senate/House Conference Committee did the Act contain the inspection certificate requirement at issue here.

The legislation, with Section 4703(a)(2) belatedly inserted, was approved on June 18, 1980, to become effective in sixty days. During the debates about the legislation, only one remark was addressed specifically to Section 4703(a)(2), that of State Representative Ritter who remarked: "I just wanted to make sure we are not talking about inspecting out-of-state trucks." *Pennsylvania Legislative Journal (House)*, Wednesday, June 11, 1980, at p. 1515.

to as "non-inspection states"] do not require interstate motor carrier vehicles registered there to be periodically inspected at the state level or to display state inspection certificates. Of the other eighteen states (most of which are situated along the eastern seaboard) that require periodic inspections of and issue certificates to their interstate motor carrier vehicles, a few like Pennsylvania impose twice-yearly inspections, while most deem once per year to suffice [such states hereinafter being referred to as "inspection states"]. Pennsylvania, however, is the only state that seeks to intrude upon the sovereignty of its sister states by requiring vehicles registered there to bear state inspection certificates as a condition to entering into Pennsylvania regardless of the law of their home states.

All interstate motor carrier vehicles, from both inspection and non-inspection states, are subject to mandatory periodic inspections under federal Bureau of Motor Carrier Safety ("BMCS") regulations. Such motor carrier vehicles are inspected at intervals ranging from four to twelve times per year under safety criteria as stringent as Pennsylvania's to insure BMCS compliance. However, no state (or federal) certificates reflecting compliance with the federal inspection program are issued. In fact, at least six states which otherwise conduct mandatory periodic inspections upon their motor carrier vehicles exempt interstate motor carrier vehicles subject to BMCS regulation. Again, however, no state certificates are issued.

The Act was scheduled to take effect on August 17, 1980.[2] On August 18, a suit challenging the constitu-

2. On August 16, 1980, the Pennsylvania Department of Transportation published proposed regulations to implement Section 4703(a)(2) to the effect that:

tionality of the Act under both the Commerce Clause and Fourteenth Amendment was commenced. Joining in that effort were the American Trucking Associations, Inc., several other trucking associations and individual trucking companies [all of whom are hereinafter referred to collectively as "ATA"]. Later, the Steamship Operators Intermodal Committee ("SOIC") intervened to articulate the particular problems to the containerized steamship industry created by Section 4703(a)(2).

On August 19, 1980, after a hearing, the Honorable R. Dixon Herman of the United States District Court for the Middle District of Pennsylvania granted a temporary restraining order. At the conclusion of four days of testimony commencing on September 8, 1980, Judge Herman entered a preliminary injunction, enjoining the named defendants [hereinafter referred to collectively as "Pennsylvania"], and all persons in their control, from enforcing Section 4703(a)(2) or the proposed regulations. Significantly, it later appears, Pennsylvania requested a delay to prepare additional evidence for a permanent injunction hearing, and such a hearing commenced on November 3, 1980. Five more days of testimony began on that day.

2. (Cont'd.)

1. Both the tractor *and* trailer in any combination weighing more than 17,000 pounds would have to bear a certificate of inspection;

2. Any document recognized by the state of issuance as reflecting compliance with its inspection program would suffice under Section 4703(a)(2) as a currently valid certificate of inspection; and

3. Any motor carrier vehicle stopped inside Pennsylvania for violation of Section 4703(a)(2) would be granted a five day grace period to obtain the requisite certificate or other document if the driver provided "adequate proof" that it had been outside of the Commonwealth continuously for at least thirty days.

Upon the close of the evidence, final oral arguments were heard on February 26, 1981.

After consideration of the exhaustive record that was developed in this case, Judge Herman, in an Opinion and Order dated June 10, 1981, granted a permanent injunction restraining all enforcement of the Act and declaring it to be unconstitutional as an undue burden upon interstate commerce. Appendix for Petitioners [hereinafter referred to as "A"], pages A45-A73, A74-A75. Judge Herman found that approximately 1,000,000 interstate motor carrier vehicles are registered in non-inspection states. A51. Each of these 1,000,000 motor carrier vehicles would be forced by Section 4703(a)(2) somehow to obtain a certificate of inspection from one of the relatively few states that inspect such vehicles and issue certificates. Because of (1) the dearth of states west of Pennsylvania in which inspections of interstate motor carrier vehicles are available, (2) the paucity of inspection stations in Pennsylvania to handle the onslaught, their limited hours of night-time operation (when most truck traffic takes place) and locations distant from major interstate trucking routes, and (3) the costs, delays, diversions from route, disruptions of service and destruction to perishables and other cargoes that would result from interrupting transit to try to obtain inspection certificates either in Pennsylvania or elsewhere, Judge Herman concluded that the Act would impose a serious burden upon interstate commerce.[3] A72.

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3. This is particularly so because of the nature of the motor carrier industry and Pennsylvania's requirement that both the tractor and trailer in tractor-trailer combinations bear separate inspection certificates. The demands of the industry, *i.e.*, the ability to pick up and deliver anywhere in the motor carrier's operating authority upon short notice, prevent carriers from being able to segregate their fleet geographically and limit only a portion to operating into and through Pennsylvania. Similarly, tractors

In light of the Act's substantial burden upon commerce, Judge Herman stated his personal belief that the balancing test would best safeguard the national interest in the free flow of goods and services in interstate commerce. To avoid creating unnecessary issues, however, Judge Herman applied the deference standard in determining Section 4703(a)(2)'s constitutionality. A69.

As to the putative safety contribution of the Act, Judge Herman found that Pennsylvania's evidence on this point was scant and unconvincing. Of all the statistical data submitted by Pennsylvania, the only items of evidence that purported to show a difference in the "safety" condition of federally-inspected interstate motor carrier vehicles from inspection versus non-inspection states were two surveys, found to be defect-ridden by the trial court, derived from roadside checks hurriedly conceived and carried out by Pennsylvania *during the brief interval* between the preliminary and permanent injunction hearings. For many reasons, including (a) the litigative context in which the surveys were conducted, (b) the haste and sloppiness with which the raw data was gathered and collated, (c) the failure of the surveys to record accurately (*or at all*) whether the stopped vehicle bore a state inspection decal or not (which was, after all, the key issue being tested), and (d) the inexperience of

3. (Cont'd.)

and trailers are seldom hitched together for more than one or two movements at a time. A tractor having delivered a trailer-load of goods in one location drops the trailer there, and picks up a new one to be hauled elsewhere. The constant interchanging of tractor and trailer equipment, together with the short notice and tight deadlines given to the carrier for shipments that have to be transported, means that even if a tractor bears an inspection sticker, when it picks up an uncertificated trailer during its travels, as well it might, entry of that combination into Pennsylvania would violate the Act.

the "inspectors" called upon to perform the roadside checks, Judge Herman rejected the surveys as meaningless. A51-A52 at n. 13.

Accordingly, even after adopting the legal standard most favorable to Pennsylvania, Judge Herman concluded that the safety contribution of the Act was illusory. A72. In fact, Judge Herman found that Section 4703(a)(2) actually *threatened to increase highway accidents* involving motor carrier vehicles in Pennsylvania by forcing large and heavy tractor-trailer combinations off the wide, straight and modern interstate highways where they typically spend the bulk of their time during interstate delivery runs, and onto narrow, hilly and winding back roads in search of Pennsylvania inspection stations. A72.

Pennsylvania appealed Judge Herman's decision to the United States Court of Appeals for the Third Circuit. In an opinion by the Honorable Dolores K. Sloviter, joined in by the Honorable Donald W. VanArtsdalen of the United States District Court for the Eastern District of Pennsylvania, sitting by designation, the court reversed Judge Herman's decision. The panel majority concluded that the deference standard should apply in Commerce Clause challenges to state highway safety legislation, and that Judge Herman, while supposedly doing so, had not correctly employed this test.

Though neither ATA nor SOIC in this case attacked the principle of safety inspections or their value in the abstract, in resolving the "safety" issue in this case, Judge Sloviter framed her two-fold inquiry as follows:

> One is whether there is a relationship between mechanical defects in motor carrier vehicles and accidents, and the second is whether there is a relationship between inspection and the timely discovery of such mechanical defects. A21.

Answering both questions in the affirmative, the panel majority then concluded that the Act would make a contribution to safety that is more than illusory. Thus, no amount of burden on commerce could overcome the Act's constitutionality.

In dissent, the Honorable Arlin M. Adams correctly perceived that the panel majority had asked and answered the wrong question in reversing Judge Herman's decision. In Judge Adams' view, the pertinent question was not whether annual or semiannual examinations of otherwise uninspected trucks and tractor-trailer combinations would contribute to highway safety, but whether the display of some state's inspection sticker makes a difference upon motor carrier vehicles that are already inspected regularly under federal BMCS standards. A40.

Unlike the panel majority, Judge Adams concluded that the prior decisions of this Court and the purposes designed to be served by the Commerce Clause argued in favor of the balancing test in cases such as this. Since to Judge Adams (1) the single most dominant feature of the record compiled before Judge Herman was the overwhelming burden on commerce that Section 4703(a)(2) would impose, and (2) interstate motor carrier vehicles are already inspected under comparable federal safety standards from between four to twelve times per year, the meager contribution of the Act to highway safety was clearly outweighed by its detrimental impact upon interstate commerce. A42-A43.

The panel majority buttressed its contrary conclusion by citing as support the discredited surveys that the trial judge had rejected as meaningless.[4] Although chiding the

4. "The Commonwealth introduced evidence that: . . . there is a relationship between low incidence of mechanical defects and periodic inspection." A20-A21.

• • • •

trial court for having discounted the surveys' results, the court of appeals did not demonstrate or hold that Judge Herman's refusal to embrace them because of their questionable credibility constituted clear error on his part. Rather, the panel majority simply concluded that (1) the surveys were part of the record, (2) regardless of the dubious circumstances in which the surveys were conceived and carried out, their results were an indication that motor carrier vehicles from inspection states had fewer mechanical defects than those from non-inspection states, and (3) this constituted a sufficient showing on Pennsylvania's part to meet its safety burden under the deference standard, notwithstanding all of the contrary evidence whose credibility Judge Herman clearly preferred.

Because this analysis, in the name of deference, actually propounds a standard of abdication, review by the Court is sought.

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4. (Cont'd.)

"[I]n rejecting the evidence of some relationship between mechanical defects and accidents, the court gave no credence to the surveys introduced by the Commonwealth which showed a relationship between a low incidence of mechanical defects and periodic inspections." A26.

REASONS FOR GRANTING THE WRIT

Both the panel majority and dissent in the court of appeals recognized that this case squarely poses the question left open in *Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662 (1981)—whether the balancing test or the deference standard is applicable in Commerce Clause challenges to state highway safety statutes. It does so, moreover, in circumstances in which the answer is outcome-determinative. The statute in question lacks the kind of questionable legislative history that led to Justice Brennan's concurring opinion in *Kassel*, and presents a clear opportunity for a majority of the Court to clarify its previously mixed signals for the guidance of all of the federal district courts, courts of appeals and state courts.

The court of appeals did not correctly interpret this Court's mixed signals in *Kassel*. That decision and other opinions by the Court support application of the balancing test. It is particularly warranted in those instances where a state statute, such as Section 4703(a)(2), will actually be detrimental to the safety purposes in whose name the statute was enacted. Finally, more detailed judicial scrutiny, of the sort the balancing test allows, is dictated where the state legislature has enacted a statute without carefully considering its implications and where there is no local, in-state constituency to exert political influence against enactment.

Even if deference is the proper legal test by which to evaluate state highway safety legislation under the Commerce Clause, the Court must correct the court of appeals and declare that deference does not mean erection of an irrebuttable presumption. Deference may mean that the courts stand aside if the legislature acted rationally; it cannot mean that the courts are powerless to intercede even

if they are not convinced, on the basis of the evidence presented, that the legislators' actions made a genuine contribution to safety.

I. The Court Should Take This Opportunity to Clarify Commerce Clause Analysis and Reaffirm the Role That Balancing Should Play in Cases Such as This.

ATA respectfully suggests that the reasoning by which the court of appeals decided to apply the deference standard is flawed and that this Court should take the opportunity to speak definitively on the issue. By doing so, the Court can put to rest an issue that has divided the circuits and will continue to perplex the district courts until resolved. *See National Tank Truck Carriers v. City of New York*, 677 F. 2d 270 (2d Cir. 1982) (balancing test adopted); *see also Gutridge v. Commonwealth of Virginia*, 532 F. Supp. 533 (E. D. Va. 1982) (balancing test).

The principal reason relied upon by the panel majority in this case for a highly deferential standard of judicial review was its conclusion that since Section 4703(a)(2) does not facially discriminate against out-of-state interests, there is adequate protection in the legislative process. A18. However, the checks and balances of the political process were not in effect during Pennsylvania's enactment of Section 4703(a)(2). Pennsylvania motor carriers were unaffected by Section 4703(a)(2). They were already subject to a periodic inspection program in their home state and therefore had established relationships with private, commercial inspection stations located near their depots to insure prompt inspection service when periodically required.

On the other hand, out-of-state carriers, like the Washington apple growers in *Hunt v. Washington Apple Advertising Commission*, 432 U. S. 333 (1977), were sud-

denly presented with a substantial barrier to carrying goods into and through Pennsylvania. Like the Washington apple growers, this barrier would affect their entire operation, not just a small portion, because there is no way to predict in advance or to isolate only a part of the carrier's fleet for use in Pennsylvania. The absence of any real impact upon in-state trucking companies means that the local interests relied upon by the panel majority to act as a counterweight against unduly burdensome state legislation really did not serve that function in this case.[5]

Accordingly, this Court should clarify the role that a judicial balancing of interests must play under the Commerce Clause where the state highway safety statute has not been subjected to the scrutiny of competing interests in the legislative process.

The panel majority also reads Justice Brennan's concurring opinion in *Kassel* as rejecting the balancing test. However, Justice Brennan recognized that heightened scrutiny is demanded where, as here, no definitive legislative discussion accompanied enactment of the statute. By the same token, Justice Marshall, who joined in Justice Brennan's concurring opinion in *Kassel*, voted with Justice Powell in *Raymond* to apply the balancing test. Moreover, in *Sporhase v. Nebraska*, 50 U. S. L. W. 5115 (U. S. July 2, 1982), seven Justices of this Court, including Justices Brennan and Marshall, applied the balancing test to a state health and safety statute. Traditionally, decisions of the Court have recognized that the state interest in protecting its citizenry in the health and safety field is just as compelling as it is in the realm of highway safety.

5. The only Pennsylvania-based motor carrier to appear at trial testified for Pennsylvania in favor of Section 4703(a)(2). Of course, its enactment did not affect his operations in the slightest, while substantially raising the costs of out-of-state motor carriers wishing to share the highways of Pennsylvania with him.

Review by the Court to consider whether balancing should apply in cases such as this is appropriate for a third reason as well. State statutes passed in the name of highway safety may fail to further that goal for a variety of reasons. A distinction should be drawn, however, between statutes which merely fail to meet the stated safety purpose without more, and those which not only fail to augment the state's safety interest but actually threaten to increase highway accidents by their own impact.

In the latter category falls Section 4703(a)(2). By forcing large and heavy tractor-trailer combinations off the wide, straight and modern interstate highways and onto narrow, hilly and winding back roads in search of inspection stations, Judge Herman found (and the court of appeals did not disturb his finding) that Section 4703(a)(2) actually threatened to increase accidents involving motor carrier vehicles in Pennsylvania. When a state legislature, without focusing upon or discussing the implications of its actions and without the advocacy of opposing constituencies, enacts a statute which promises not only to do little good but actually would bring about substantial harm, this should be a factor in deciding how much deference should be accorded the statute under Commerce Clause analysis. The fact that the statute in question is completely out of line with the laws of other states and intrudes upon their sovereignty is an additional factor militating in favor of a balancing approach. *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959).

II. Even if Justice Rehnquist's Deference Test Is Applicable to Commerce Clause Challenges to State Highway Safety Legislation, Deference Does Not Mean Judicial Abdication.

If the court of appeals correctly discerned from the Court's mixed signals that deference is the proper test to

apply, review is still appropriate if only to clarify how that test should be implemented. The panel majority, to find a basis upon which to reverse Judge Herman, coupled evidence in the record that did not speak to the Act's contribution to safety with other evidence that purported to address the issue, but which Judge Herman rejected as meaningless.

The result is an opinion which blurs a crucial distinction—the Pennsylvania legislature may very well have been rational in its wish to try to reduce highway accidents involving trucks; however, if the way it went about trying to do so was not shown by any competent evidence to make a meaningful contribution to that end, the legislators' good intentions alone cannot insulate the Act from further Commerce Clause inquiry. Stated differently, if state legislators think they are serving the interest of highway safety, does that fact alone bind the trial court to uphold the constitutionality of the resulting statute notwithstanding (1) its tremendous impact on interstate commerce, (2) its threat actually to worsen the danger of accidents on the road, and (3) the total absence of credible evidence that it will actually contribute to highway safety?

Aside from the two discredited surveys, the statistical evidence adduced by the panel majority in support of the Act's constitutionality only demonstrates (a) that trucks are involved in a regretably high number of accidents, (b) that a portion of these accidents involve vehicle defects, and (c) that many motor carrier vehicles stopped on roadside checks by BMCS inspectors are found to have defects. A19-A20, A25.

This evidence concededly demonstrates that a problem exists about which the Pennsylvania legislature could rationally be concerned. The evidence does *not*, however, support the conclusion the panel majority then reaches—that enactment of Section 4703(a)(2) was a meaningful

response to such problem. First of all, the motor carrier vehicles represented in the accident and roadside check surveys cited by the panel majority were registered in both inspection states and non-inspection states.[6] However, each vehicle's state of origin was not captured in the surveys' results, and hence the surveys did not attempt to (nor could they) demonstrate a difference in the accident or defect experience of federally-inspected motor carrier vehicles from inspection states against those from non-inspection states.

The only other basis offered by the panel majority for its reversal of Judge Herman was its rather self-evident observation that inspections will detect some existing vehicle deterioration before it reaches the final state of failure. Implicit though unstated in this observation is the notion that if interstate motor carrier vehicles are now being inspected 4 to 12 times per year under the BMCS program, Section 4703(a)(2) will contribute to safety by requiring one or two *additional* inspections, which cannot but improve their safety record.

This assumption is wrong for two reasons. It ignores the authorization given to fleet inspections under Pennsylvania law and the laws of other states. *See, e.g.*, 75 Pa. Cons. Stat. § 4723. A motor carrier who enjoys fleet inspection privileges performs his own periodic state inspections and affixes the certificates himself. The state-sanctioned periodic inspections are performed by the *same*

6. Curiously, the court of appeals ignored the only data that compared the *accident* record of federally-inspected interstate motor carrier vehicles from non-inspection states against that of vehicles from inspection states. This evidence, a statistical survey by Pennsylvania's Department of Transportation of accidents involving heavy trucks in 1978, showed that it was tractors from *inspection states* that were involved in a disproportionately higher number of defect-related highway accidents.

employees who regularly inspect for BMCS compliance. As to these carriers, the advent of Section 4703(a)(2) will simply mean that during one or two of the 4 to 12 BMCS inspections per year the employee will additionally affix some state sticker to the motor carrier vehicle.

Secondly, under the BMCS federal safety standards, the carrier is obliged to inspect his vehicles regularly and systematically. There is no requirement as to who performs the inspections, just that they be done. Thus, a carrier is free to have one or more of his BMCS inspections performed at a private, commercial inspection station, from which a state certificate can also be obtained when required. While it may be costly, time-consuming and burdensome to the carrier to shift the locus of some of the inspections from his maintenance shop to an outside station, the point is that nothing in Section 4703(a)(2) will necessarily increase the total number of inspections to which even non-fleet inspected vehicles will be subjected.

In summary, the Pennsylvania legislature may have been hoping to improve highway safety by enacting Section 4703(a)(2), but no credible evidence of trial, statistical or otherwise, suggests that the Act accomplished that goal. Its impact on safety will actually be adverse. Under the deference test, a showing of a meaningful contribution to safety may insulate a statute from challenge despite its burden on commerce. The court of appeals, however, has created a new doctrine that irrebuttably presumes that burdensome state legislation satisfies Commerce Clause scrutiny so long as the state submits *any* evidence of the legislators' earnest desire to promote safety. This result applies even if, as here, the trial court simply did not believe the state's evidence that the statute would produce any such beneficial results.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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